Municipal Liability Insurance In Ontario

A Preliminary Report of the Advisory Committee
to the Minister of Municipal Affairs
April, 1966

TABLE OF CONTENTS

PREFACE

COMMITTEE MANDATE

CHAPTER ONE - THE MUNICIPAL SECTOR

LOCAL GOVERNMENT STRUCTURE	1.1
LOCAL GOVERNMENT ADMINISTRATION	1.3
PROVISION OF SERVICES	1.6
INSURANCE FOR MUNICIPALITIES	1.14

CHAPTER TWO - THE INSURANCE INDUSTRY

THE INSURANCE MECHANISM	2.1
Determination of Risk	2.2
Tendering	2.4
Limits or Amounts of Insurance	2.5
Layering of Insurance	2.6
Policy Conditions	2.7
OVERVIEW OF THE LIABILITY INSURANCE MARKET	2.8
REINSURANCE	2.10
THE INSURANCE INDUSTRY PROBLEMS	2.11
DETERIORATION OF THE LIABILITY INSURANCE MARKET	2.13
CLASSIFICATION OF MUNICIPALITIES	2.14
SOURCES OF MUNICIPAL LIABILITY INSURANCE	2.15
GENERAL REMARKS	2.20

CHAPTER THREE - THE PROBLEMS - IDENTIFIED AND DIAGNOSED

INTRODUCTION	3.1
TWO BASIC PROBLEMS FOR MUNICIPALITIES	3.2
Premium Levels	3.2
Levels of Available Coverage	3.4
REASONS IDENTIFIED FOR THE CURRENT CRISIS	3.6
MUNICIPAL LIABILITY INSURANCE MARKET	3.7
GLOBAL MARKET IMPACTS	3.8
THE JUDICIAL SYSTEM	3.9
COURT AWARDS AND OUT-OF-COURT SETTLEMENTS IN ONTARIO	3.11
COST COMPONENTS OF SETTLEMENTS AND AWARDS	3.12
MUNICIPALITIES AND THE LAW	3.13
STATUTES INCREASING MUNICIPAL EXPOSURE	3.14
Family Law Reform Act	3.14
Limitations Act	3.14

	The Negligence Act	3.14
	Occupiers' Liability Act (OLA) and Trespass to Property Act (TPA)	3.15
	Environmental Protection Act/Part IX	3.16
	STATUTES AFFECTING THE SIZE OF AWARDS	3.17
	Courts of Justice Act	3.17
	1) Prejudgement Interest	3.17
	2) Structured Settlements or Periodic Payments	3.17
	HEALTH INSURANCE ACT	3.18
	OTHER RISK EXPOSURES	3.19
	Provision of Services	3.19
	Local Boards, Commissions, Committees and Volunteer Groups	3.21
	Non-Homogeneity	3.23
	STANDARDIZATION	3.25
CHAPTER FOUR	**- RECOMMENDATIONS**	
	PREMIUMS AND COVERAGE	4.1
	DISASTER COVERAGE	4.2
	REINSURANCE	4.3
	MUNICIPALITIES AND THE LAW	4.3
	Limitations Act	4.3
	Negligence Act	4.4
	Occupiers' Liability Act (OLA) and Trespass to Property Act (TPA)	4.5
	Environmental Protection Act	4.5
	Courts of Justice Act - Structured Settlements	4.6
	OTHER RISK EXPOSURES	4.7
	HEALTH INSURANCE ACT	4.7
	STANDARDIZATION	4.8
	LEGISLATION REQUESTED	4.8
	Capping	4.8
	Good Samaritan Legislation	4.9
APPENDIX A	**- GLOSSARY OF INSURANCE TERMS**	
APPENDIX B	**- SUMMARY OF STATUTES REVIEWED**	
APPENDIX C	**- PRESENTATIONS MADE TO THE COMMITTEE**	
APPENDIX D	**- BRIEFS SUBMITTED TO THE COMMITTEE**	

PREFACE

The Advisory Committee on Municipal Insurance, announced by the Minister of Municipal Affairs, the Honourable Bernard Grandmaitre, held its first meeting on February 20, 1986. Three municipal representatives were appointed to the Committee. Mayor Claudette Millar of the City of Cambridge is chairing the Committee and is joined by Mayor Bruce Sinclair of the City of Etobicoke, and Mayor Peter Clark of the Township of Cumberland.

The terms of reference required the Committee to review both the cost and coverage availability problems associated with the municipal liability insurance industry in Ontario, and to review various approaches to resolving these problems. Numerous presentations have been made and briefs submitted to the Committee, and for this factual and enlightening support the Committee is grateful.

In particular, special thanks are extended to Mr. Donald D. McKay, F.I.I.C., General Manager of the Facility Association, past President of The Gore Mutual Insurance Company and past Director of the Insurance Bureau of Canada, for his invaluable volunteer participation as a special advisor to the Committee.

Considerable time has been spent in the preliminary report outlining municipal responsibilities and risks, the role of the

insurance industry and identifying the reasons behind the current crisis. In addition to the general observations and recommendations offered, chapter four of this report identifies subject areas which the Committee proposes to study in depth before recommending solutions in its final report later this year.

COMMITTEE MANDATE

The Advisory Committee will review both cost and coverage problems as they relate to municipal liability insurance availability in Ontario.

It will review various approaches to resolving these problems including the possibility of establishing a municipal reciprocal insurance exchange and make recommendations to the Minister so as to:

- encourage and foster long-term stability in municipal liability insurance markets;
- provide adequate coverage for all municipally related risks without unnecessary exclusions;
- ensure premium costs commensurate with the claims record for the municipal liability insurance market in Ontario;
- promote improved risk management procedures at the individual municipality level; and
- propose a suitable format and timetable for reviewing other municipal insurance needs (i.e. property, fleet, etc.) if deemed appropriate.

There are two dimensions to the timing of this Committee. To ensure adequate opportunity to provide advice to the Provincial Task Force on Insurance, which is to report to Cabinet by May 1, 1986, this Advisory Committee should be prepared to make a preliminary report on the most pressing issues to the Minister of Municipal Affairs by mid-April, 1986.

The final Advisory Committee report should be completed by October, 1986, so that any implementation arrangements required can be in place before insurance policy renewals for 1987 fall due.

CHAPTER ONE

THE MUNICIPAL SECTOR

In accordance with its short-term goals, the Advisory Committee has attempted to review the overall difficulties currently being experienced by municipalities in securing reasonably priced liability insurance. It quickly became apparent that a general knowledge of the structure and service mandate of local governments in Ontario was crucial in understanding the complexity and diversity of the issues now facing officials of these municipal corporations, particularly in respect of their extensive liability exposure. Municipalities differ significantly in size, structure and geographical nature and bear diverse authority and responsibility for services, land and facilities. They also bear an excessively large degree of liability exposure attendant to these responsibilities. Chapter one will discuss the structure and administration of local government in Ontario and the provision of municipal services as they relate to municipal liability.

LOCAL GOVERNMENT STRUCTURE

The responsibility for local matters is assigned to the provincial level of government in Canada. In Ontario, local government includes municipalities, school boards and other local boards; however, the Committee's concerns at this time rest solely with municipalities and their local boards. The

scope of local government jurisdiction, its duties, functions and financing powers are established and defined by provincial statute. Local boards, in turn, are established under provincial legislation or set up by municipalities to discharge specific functions. Aside from any general or specific statutory restrictions based on the corporation's status, municipalities and their local boards enjoy a large degree of autonomy in establishing their role in the community and in carrying out their functions as the provider of many municipal services.

Of the 839 municipalities in the Province, 800 are lower tier or local municipalities: cities, towns, separated towns, villages, townships or improvement districts. Counties and regional governments, or upper tier municipalities, comprise the balance. Local government in Ontario also includes more than two thousand local boards and commissions.

Local municipalities within the county system are responsible for most of the services provided to their residents. The responsibilities of county governments are generally confined to the provision of social and health services and the construction and maintenance of county roads and bridges. The cities and separated towns in a county are, for the most part, independent entities providing the full range of municipal services to their residents.

Two-thirds of Ontario's population reside in areas with a regional form of government. There are ten regional municipalities, as well as the Municipality of Metropolitan Toronto, the District Municipality of Muskoka and the restructured County of Oxford. While there are variations among regions, regional services generally include major roads, transit, policing, sewer and water systems, planning and development on a region-wide basis, capital borrowing, and health and social services. All the lower tier municipalities are part of the region and generally are responsible for local sewer and water services, roads, fire protection, recreation and local planning needs.

LOCAL GOVERNMENT ADMINISTRATION

Municipalities and those local boards and commissions which are not directly subordinate to municipal councils have the same legal status as private business companies. Their administrative structure is also very similar to businesses, with the elected municipal council acting in the same capacity as a board of directors. Their decisions are given legal authority through by-laws, which are the local equivalent of an Act passed by the Provincial Legislature or the House of Commons.

Municipal councillors are elected and hold office for three years; although, in some upper tier municipalities, councillors are appointed from the councils of lower tier municipalities.

Apart from public utility commissioners, who may be elected or appointed, members of all local boards are appointed, normally, by municipal councils. The term of office for board members, who may also be municipal councillors, usually coincides with that of the council which appointed them.

Local boards and commissions vary tremendously in size, function and power. For example, Police Commissions have a wide range of legislated powers including the power to pass certain by-laws, while, such boards as those for park management or museums may be operated as municipal departments. Conservation authorities provide watershed control and recreation in areas drained by specific river systems and some municipalities operate airports. The boundaries of boards for Homes for the Aged, Children's Aid Societies and Health Units generally follow county/regional boundaries in southern Ontario and district boundaries in the north. Boards which serve more than one municipality are usually referred to as joint boards. Certain boards, including hospital boards and district health councils, are not considered part of local government since they relate more to the provincial than to the municipal level of government.

Municipal councils' control over the financial operations of local boards varies from board to board. In most cases, municipal councils have the right of approval of a board's budget. Some boards, such as Police Commissions, can appeal municipal decisions on budgets to the Province, which makes the

final ruling. By and large though, the ultimate responsibility for these entities falls on the local municipality.

While the municipal council has overall administrative responsibility, the day to day operations of municipal departments are directed and overseen by a system of committees selected from among council members. Given the multiple service responsibility of municipalities, committees are widely used in urban municipalities in such areas of activity as finance, public works, protection, cultural and social services. In addition to committees, many municipalities are assisted by a network of volunteers. Although these networks may be more formal in some municipalities than in others, they are always an integrated and particularly supportive element in social and recreational programs. Since volunteer advisory committees to council have no ultimate authority, their actions must always be authorized by council through the passing of by-laws. The number of committees in any one municipality depends largely on local needs, the size of the municipality, the number of functions for which the municipality is responsible and the size of council.

Some cities also have a board of control composed of the mayor and two to four councillors elected at large. In effect, the board of control is an executive committee of council. Some of its duties include the preparation of the budget, the calling and awarding of tenders and the hiring and firing of appointed

department heads. Unlike committees, whose actions must always be sanctioned by council through by-laws, the board of control has extensive independence of action. Council can only alter board of control decisions by a two-thirds majority vote.

As an elected body, the municipal council as a whole bears ultimate responsibility for the affairs of the municipality, including the functions carried out by all local committees, volunteer groups, boards and commissions.

PROVISION OF SERVICES

Municipalities and their associated local boards provide a decidedly divergent group of services, for which they bear an excessively large degree of liability exposure, compared with resident taxpayers and corporations. Municipal responsibility encompasses not only the provision of services but also includes an incumbent responsibility as owner and occupier of many diverse properties including land, structures and facilities. As well, responsibility is assumed by a municipality for the many volunteers assisting in the provision of services and community activities.

Naturally, municipal governments attempt to permit their citizens the widest possible access and use of municipal properties. Although it is expected that persons using these facilities will be able to do so in a safe manner, if anyone is injured, the municipality may be held partially liable for the

injury. The municipality may be viewed as having created a nuisance and/or as being negligent in the maintenance of its premises or property. Roads and sidewalks, including road signs and traffic signals, are perhaps the broadest areas of municipal exposure. However, exposures are also considerable in parks and recreation activities. Arenas, sports facilities, play equipment and beaches, as well as the unusual exposures created by special events, such as parades, races, carnivals and musical concerts, all increase the risk of liability claims.

To appreciate fully the scope of this exposure, it is useful to explore the many areas of municipal involvement, keeping in mind the different structures of municipalities and their varying responsibilities for different services. The functions performed by municipalities can be generally classified under general government, protection to persons and property, transportation, environment, health and social services, culture and recreation, planning and development.

General Government includes the functions and expenses related to municipal councils, general municipal administration, tax collection, elections, auditing and a variety of other functions not allocated to other areas. Protection against liability for errors and omissions is the key liability coverage concern in this area.

Protection to persons and property involves responsibility for policing, fire services, conservation authorities and a number of other services.

Policing includes the provision of police forces, offices, garages, lock-ups, equipment, police animals and boards of police commissioners. By and large, the most common claims against police forces relate to automobile accidents. An officer's failure to investigate or direct traffic properly (funeral escorts, point duty) and his "fault" in causing an accident or damages, particularly during a pursuit, are often cited in claims. Assault and false imprisonment are further common areas of liability.

Fire protection requires both regular and volunteer fire-fighting forces, firehalls, equipment, auxiliary services, fire prevention, inspections, and other emergency assistance measures, including paramedical type services. Recent claims that have been successfully brought against municipalities have been for such things as deficient fire-fighting facilities, poor response time and insufficient water pressure to properly operate fire-fighting equipment and a sprinkler system.

Conservation authorities control drainage throughout river watershed areas, protect the natural environment within municipalities and provide a variety of recreational facilities. A 1985 claim against a conservation authority which was settled for more than $900,000 illustrates the

difficulty of predicting accidental risk exposures. It involved the limb of a tree falling on a tent trailer in the campsite area and severely injuring a camper. Although the court held that the tree was showing signs of decay and that the municipality should have been aware of it, it is virtually impossible for most municipalities to be fully aware of the condition of ali their natural resources, which cover such large areas.

Building and structural inspections, fence viewing, pest control, animal control, by-law enforcement (where not a public health function), licencing, flood control and flood damage repairs are further services performed by local governments to protect their residents and property. In British Columbia, a successful case was made against a municipality (25 per cent responsible) for failing to enforce the provisions of its construction by-law. The case was filed by the purchaser of a resale home who discovered cracks in the foundation, indicative of major structural faults, following the purchase.

Transportation services include the repair and maintenance of road surfaces, shoulders, roadsides, sidewalks and bridges. In addition, suburban roads commissions, surface drains and ditches, child crossing patrols, pavement marking, traffic signals, railway crossing signals and winter control (salting, sanding and snow removal) are all provided by local governments.

Urban transit systems are municipal responsibilities and a few municipalities maintain small airports, landing strips and docking facilities, as well as parking authorities and street lighting.

Liability claims are perhaps most frequent in the area of transportation services. Many slip and fall accidents have occurred where the municipality is held responsible for permitting the defective condition of a sidewalk or roadway, including icy conditions. Such individual claims are frequent and settlements have, in the past, exceeded $50,000. Failure by the municipality to maintain or repair roadways and signs properly are also now frequently being cited in successful claims. Such negligence was found against an Ontario municipality ($130,000) in a recent accident involving a driver who lost control of his vehicle on a gravel roadway and sustained severe injuries.

Environmental services include the provision and maintenance of sanitary sewers, storm sewers, sewage treatment plants, public washrooms and waterworks systems. The collection and disposal of garbage and waste (incinerators and sanitary land fills) is also a municipal responsibility. Typically, claims in this area relate to flooding caused by storm sewer overflows and water main ruptures. One such incident followed a severe three-day rainstorm in 1984. Approximately 1900 claims are outstanding against a regional municipality, based mostly on negligence and nuisance, for property damage, clean up, etc.,

caused by sewer back ups during the storm. The eventual settlements on this number of claims could be as high as several million dollars.

Health and social services for which municipalities and their local boards are responsible cover public health, general assistance, assistance to the elderly and to children.

Public health involves health units, venereal disease control, communicable disease control (including immunization and vaccination), school dental care, disinfestation of premises, municipal ambulance services, cemetery boards and morgues.

Municipalities are required to provide welfare assistance to needy residents not qualifying under federal and provincial welfare programs, through social services departments and welfare boards. Homemaking and nursing services to incapacitated persons are also provided.

Assistance is given to the elderly in the form of Homes for the Aged, housing for elderly persons, home care and transit. Municipal day nurseries and Children's Aid Societies are key services supporting children.

All aspects of this service function have high risk potential. Home visits, transportation of the elderly, child care and ambulance services are all significant risk exposures. In

addition, the extensive volunteer support in this area provides a further degree of vulnerability.

Recreation and cultural services provided by municipalities and local boards include parks, playgrounds and amusement parks, community centres and halls, skating rinks, swimming pools, stadiums and arenas, community and recreation programs. They also provide cultural services such as zoos, theatres, auditoriums, concert halls, art galleries, museums and archives, and historic sites.

The largest, and most timely, example of exposure in this area is seen in the McErlean case against the City of Brampton. The City was held liable for not signing, restricting the use of, or foreseeing the danger leading to the trail bike accident which occurred in 1977. The accident occurred in an abandoned gravel pit, which the City owned and had designated as parkland but had not yet developed. The court awarded Mr. McErlean, who was rendered a quadriplegic through the accident, $6.3 million; although, the case is currently under appeal.

Planning and development responsibilities incorporate land use planning, which involves planning departments and boards, committees of adjustment, land division committees, industrial or development commissions and committees, industrial parks and land assembly for recreational, commercial and industrial purposes, and business improvement areas. Weed control, tree

cutting, agricultural development through drainage, and other programs also fall under this category.

Although, this might be considered a service area of little risk, many successful claims have been made against municipalities. One such claim ($99,000) involved the death of thousands of fish following weed spraying operations prior to a heavy rain. It was assumed that water ran from the sprayed area into the pond, killing the fish.

The complexity of providing so many and such divergent services, especially within current budget constraints, makes municipalities vulnerable to an ever-growing number of risks. It is a continual and often difficult process to identify or anticipate specifically the resources for which municipalities are responsible and the accidental loss exposure that could materially affect them. Many direct liability exposures may have indirect consequences for municipalities. Indirect exposures are generally related to extra expenses that are incurred in order to maintain necessary operations or services. Many municipalities operate income producing facilities whose earnings could be interrupted by a direct physical loss, i.e. sports and recreational facilities, parking lots. As well, a major area catastrophe, even if it did not directly affect municipal property, might have a significant negative effect on tax income. Further, the legal, social and economic developments of the times continue to create exposures

which may never have been considered or may have seemed remote a few years ago.

Local government services have indeed become an increasingly risky business and an increasingly difficult commodity to quantify for insurance purposes.

INSURANCE FOR MUNICIPALITIES

Insurance has been the primary method of protecting municipalities and their resources against accidental or catastrophic losses resulting from their unusual degree and diversity of risk exposure. Common areas of insurance coverage have included property, machinery, crime, bonding, automobile and general liability. Until recently, obtaining coverage was a fairly routine annual procedure for most municipalities.

Until the early 1980s, the insurance industry was enjoying high rates of return on its investments, a high volume of premiums, and a relatively stable level of municipal claims. Coverage was both available and affordable. So affordable, in fact, that it perpetuated a false sense of being "protected" against all eventualities by insurance. Recently, the liability insurance market abruptly turned, and in the view of many, without warning. Premiums increased dramatically on average. In most cases, at policy renewal time, municipalities were receiving less coverage while paying more and often absorbing higher deductibles. Due to recent local and international

events, insurance companies claimed they could no longer reliably predict the ultimate expense of municipal claims, nor could they continue to provide blanket liability coverage for what seemed to be an unquantifiable degree of exposure.

In the initial stages of review, the Advisory Committee is focusing on the immediate problems municipalities are facing with general liability insurance, although the Committee's longer term recommendations may include other areas of concern, such as bonding and property insurance. The following chapters detail the insurance industry itself, the specific issues relating to the current liability insurance crisis in the municipal sector and the Committee's preliminary recommendations.

CHAPTER TWO

THE INSURANCE INDUSTRY

THE INSURANCE MECHANISM

Insurance is a mechanism whereby the financial risks of individuals or corporations may be transferred to other individuals or corporations for a consideration. The risk is usually transferred by contract to an insurance organization, the consideration being the premium. The insurance organization may be a mutual insurance company, a stock insurance company, or a reciprocal insurance exchange.

The risk transferred may involve financial loss arising out of the destruction of fixed property, the financial loss to others arising out of the negligence of the policyholder, the financial loss to moveables, such as automobiles or other equipment, or the financial loss of money or securities as a result of malfeasance.

In the past, it has been more appropriate for municipalities to transfer their own risk of financial loss to an insurance organization and, by this means, budget the fixed cost of the premium rather than expose their finances to the possibility of a major financial loss which could result in future costs to the taxpayers.

A municipality must decide how it will obtain the necessary insurance protection and provide the maximum benefit at a cost commensurate with its budget. This amount will vary because of the limits of insurance and extent of the insurance contracted, as well as the self-insured amounts. The nature of the municipal services to be protected, as well as the past type and size of claims incurred, will also affect the size of the premium required by the insurance organization.

Determination of Risk

A municipality which provides extensive services, such as transit, recreational, community and library will find that its costs are greater than a municipality which supplies only limited or essential services. Natural features, such as an earthworks dam used to provide waterworks for the municipality, may be a major factor in deciding the cost of the liability exposure which is being transferred by the municipality to an insurance organization. The extent of municipal roadways and bridges, as well as their condition and general maintenance, should also be a consideration.

While a relationship exists between the size of the population of a municipality and its insurance costs, this relationship is incidental and not causal. The determination of what might represent a proper premium for an insurance organization to assume the financial risks of a municipality can only be projected by an examination of the physical characteristics of

the municipality, the extent of the services it provides and its past history of claims. Where several municipalities have similarities in these criteria, then their premium levels should also be similar.

Since to some extent each municipality possesses unique features and has developed its own claims experience, it can be determined that, to a certain extent, municipal liability insurance is self rating; that is, each municipality is responsible for its own level of premiums.

Only the large municipalities retain an insurance risk manager to oversee the management of the municipal insurance program. A relatively new phenomenon is the establishment of a risk management committee; while some municipalities do not have a risk management program. The balance of municipalities depend on staff to determine their insurance requirements. This is not difficult as the insurance program has been developed over a long period of time and continuity of staff and administrators has resulted in most being fairly knowledgeable on the subject of insurance.

When a municipality has determined what should constitute its insurance program, it may put the specifications out to tender or, alternatively, invite specific individuals or organizations to submit proposals for discussion and negotiation.

Tendering

Tendering or open bidding for municipal insurance was virtually non-existent prior to 1967. Between 1967 and 1979, less than 100 of Ontario's municipalities called for tenders or other forms of open competitive bidding for their general insurance.

Insurance organizations will not respond to tenders, as it is indicative that the municipality is not seeking to establish a long term relationship with an insurer. One individual who made a presentation to the Committee believed that the tendering process has deprived municipalities of some of the soundest insurers in the business.

The costs of initially determining the premium level for the municipality and the servicing of the business, which could include regular meetings with municipal officials to provide counsel and advice on insurance matters, loss prevention programs and claims involvement, require an ongoing relationship between the municipality and its insurer, which could result in containment of the premium level over the longer term.

Liability claims, especially large ones, have a history of requiring a long period of time to settle. For example, only 38 per cent of the value of liability claims will be settled in the first year, 22 per cent in the second year, 10 per cent in the third year, while the balance of 30 per cent may take as

long as ten years to dispose of, and these tend to be the larger and more complex claims.

Limits or Amounts of Insurance

When purchasing insurance on physical properties, and this would include buildings and equipment, the municipality should purchase insurance which will provide that the property will be replaced without consideration for depreciation, if the property is damaged or destroyed. The amount of insurance required is relatively simple to determine, as it would be the actual cost to replace.

The determination of how much liability insurance to purchase is somewhat less evident, as the amount should bear some relationship to the maximum liability to which the municipality may be exposed and this is very difficult to measure. The largest judgement rendered against a municipality was $6.3 million in the "McErlean vs. Brampton" case. The incident occurred in 1977 and the judgement was handed down in 1985. A very recent settlement of $7 million was reached in Toronto involving a pedestrian and a vehicle operated by the Municipality of Metropolitan Toronto. In this situation, Metro Toronto was not totally liable for the $7 million, as the loss was apportioned.

It should be noted that the limit of the liability insurance purchased is the limit applying to claims arising out of a

single incident and not the total limit for all claims. The total limit of liability insurance is not reduced by claims. For example, if the limit of liability purchased was for a total of $10 million, and a claim for $5 million was made against the liability policy, the limit would still remain at $10 million.

Situations that might require very high limits of liability insurance could arise where the municipality operated its own gas distribution system, or was responsible for an earthworks dam or dykes, where the failure of the service could do extensive damage to property of others. Thus, the maximum possible loss exposure should be estimated and insurance purchased to meet this need.

Layering of Insurance

In order to avoid so-called "shock" losses, insurance organizations attempt to limit the amount of their exposure in any one loss. Typically, this is done by reinsuring their policy with another insurance organization, usually a reinsurer. Thus, while the policy of insurance held by the municipality may indicate a total limit of liability of $1 million, the insurer of the contract may be retaining only $250,000 for his own account, and the remaining $750,000 may be placed with several reinsurers. This should not create a problem if a claim is made, as the reinsurers are bound to

"follow the fortunes" of the insurance organization issuing the policy and abide by its claims decisions.

Another method of providing for larger limits of liability insurance is to create "layers" of insurance with different insurance organizations' being liable for different amounts of insurance. For example, one insurance organization may insure the first $1 million layer, a second insurance organization may issue its policy for $4 million in excess of the first one million and still another insurance organization for $5 million in excess of five million. Thus a total limit of liability insurance of $10 million may be shared by three insurance organizations, who may, in turn, reinsure a portion of their layer.

Policy Conditions

Insurance contracts, or policies, detail the situations and circumstances under which they will respond to protect the financial interest of the policyholder. They also impose certain conditions of conduct on both the policyholder and the insurer. With the exception of the automobile insurance policies, there are no standard contracts used for any insurance coverage, although certain contracts must contain the statutory conditions prescribed by the Insurance Act.

The lack of uniformity of contract creates difficulty when comparing premiums among different insurance organizations

because the product that each offers may contain dissimilar conditions under which repayment may be claimed.

The lack of uniformity of contract may also create difficulty within corporations, when the contracts of different insurance organizations are used to create the total amount of insurance by the use of layering; that is, different insurance organizations undertake to provide insurance from zero to $1 million, from $1 million to $5 million, and so on. It is frequently found that the contracts used in the layering process are not consistent, so an insured corporation may be protected against financial loss arising out of a particular incident in one layer of insurance, but not protected for the same incident in another layer.

OVERVIEW OF THE LIABILITY INSURANCE MARKET

Since the terms of reference for the Committee specifically require that both cost and coverage problems as they relate to municipal liability insurance in Ontario be reviewed, it is necessary that particular emphasis be placed on the providers of that coverage and how they have been affected by changing world market conditions.

While there would appear to be a large premium base for liability insurance in Ontario, considering the size and scope of some of the businesses and industries involved, the base is not really significant in comparison with other pools. The

following table indicates the total premiums written and the loss ratio over the past five years:

LIABILITY INSURANCE - ONTARIO
(Includes products, professional, municipal and commercial liability)

	Premiums Written	Loss Ratio
1980	$202,354,205	50.53
1981	214,651,672	66.77
1982	226,888,258	83.89
1983	230,423,941	104.15
1984	278,859,263	91.37

Source: Stone & Cox - Provincial Results.

Note: The Loss Ratio is the ratio of the direct claims incurred to direct premiums written, without overhead expenses, commissions and taxes.

No one insurer has a significant share of the liability insurance market, as will be noted in the following table. Ninety-four insurers reported liability insurance premium volumes in excess of $500,000, but of the top ten insurers, the largest, Royal Insurance Company, had only a 7 1/2 per cent share of the market.

LIABILITY WRITERS - ONTARIO 1984
(Includes products, professional, municipal and commercial liability)

Rank	Company	Direct Premiums Written ($000's)	Loss Ratio
1	Royal Insurance Company	$21,008	147.5
2	General Accident Assce.	14,239	153.8
3	Simcoe & Erie	10,832	63.8
4	Canadian Indemnity	10,109	132.4
5	Kansa General Insurance	10,059	65.7
6	American Home Insurance	8,925	30.8
7	Economical Mutual	8,697	86.2
8	Crum & Forster	8,091	47.9
9	Wellington Insurance	7,935	82.1
10	Scottish & York	7,811	121.6
*30	Guarantee Co. of N.A.	7,608	141.3

Notes:

* (Included because of this company's major participation in municipal liability)

Direct Premiums Written - before addition of any reinsurance assumed or subtraction of any reinsurance ceded.

Loss Ratio - the ratio of direct claims incurred to direct premiums written, without overhead expenses, commissions and taxes.

Source: Stone & Cox - Provincial Results.

REINSURANCE

In order to provide protection for their policyholders, it is necessary for insurers to reinsure part of each contract with reinsurers. This allows the insurer to spread the risk of loss over a much wider base, thus protecting its own financial integrity and providing assurance to the policyholders that their insurer will be able to respond financially, when called upon to do so.

Without the protection of reinsurance, many smaller insurers are unable to continue to provide insurance protection. Thus, should the reinsurance market become impaired, the availability of insurance in the primary or basic market also becomes impaired. Therefore, when dealing with a primary insurer, it is important to obtain assurance of the stability of the reinsurance markets being used. If the primary insurer's reinsurer is a federally registered reinsurance company, then the policyholder can at least be secure in the knowledge that

the reinsurer's affairs are under the supervision of the Federal Superintendent of Insurance, although this is not necessarily a guarantee of the reinsurer's continued solvency.

The reinsurance companies to which the primary insurer must look, whether mutual, stock company or reciprocal exchange, are almost all international and off-shore. Their affairs in Canada are frequently managed by reinsurance brokers and in some cases the reinsurer has maintained a branch office in Canada. There is only one major Canadian reinsurance company, although there are some Canadian reinsurance participants.

THE INSURANCE INDUSTRY PROBLEMS

What might be termed as poor management practices in Canada and the United States have resulted in two major insurance industry problems which have undermined the traditional structure and relationship that had hitherto existed between primary insurance organizations and the reinsurance community.

The first problem was created by a prolonged period of very intense competition for premium volume, at any cost, to take advantage of very buoyant investment opportunities. Eventually, the premium inadequacy generated by the competition was greater than the investment advantage; and it was inevitable that premium levels would have to seek a level more commensurate with the level of losses being incurred.

During this period, municipalities were able to take advantage of some very competitive premium levels. It should be noted, however, that one competitor, the Northumberland Insurance Company, which insured several municipalities in the province of Manitoba, became insolvent and was placed in liquidation by the Federal Department of Insurance.

The second problem was a failure by insurers to properly recognize and assess the ultimate settlement value of claims that had been incurred. Because of this failure, reinsurers were not aware of the growing catastrophe which was increasing their liability, which, coupled with the premium inadequacy, left them in a financially vulnerable position. While some underestimation of claims liability might have been the result of an insurer's or broker's desire to maintain effective reinsurance arrangements and not disturb the status quo, most of the failure could be stated as a failure of the insurers to recognize the changing legislative and judicial environment.

As will be noted, there has been a growing trend of broadening the exposure to liability claims costs since 1977. The interpretation of the courts in specific cases could not have been anticipated but, generally, insurers should have been aware of the changing environment for claims settlement. They not only failed to recognize this in most instances but even embarked on competitive premium-cutting programs in the face of it.

DETERIORATION OF THE LIABILITY INSURANCE MARKET

Some indication of the deterioration of the liability portion of the general insurance industry can be seen in the comparison of the liability premiums and claims, as a portion of the total insurance business. In 1980, liability premiums accounted for 6.2 per cent of all business; in 1984, the share was relatively unchanged at 6.4 per cent of the total. However, in 1980, liability claims represented 4.7 per cent of all claims incurred, but in 1984, this share of the total claims had risen to 8.8 per cent of the total.

It is perhaps axiomatic that with little hope for anything but a financial loss in this class of insurance, many insurers and reinsurers made the decision that they wished to employ their capital and resources in other areas where the prospect of financial return was somewhat better. Those insurers and reinsurers who made the decision to remain and issue contracts of liability insurance, calculating the past trend, and projecting it into the future, required considerably more premium in their assessment of the risk.

This is a classical supply/demand syndrome, that is, as the demand increases and the supply diminishes, the price of the product rises. The supply has diminished because of the suppliers' reluctance to market the product in the face of increasing losses.

There are no accurate statistics available to indicate the actual loss experience in the field of municipal liability insurance, although those companies primarily in the municipal liability market in Ontario are included in the previous list of liability writers. Their loss ratio would indicate that they had much higher than average losses in 1984:

Company	Loss Ratio
General Accident	152.8%
Scottish & York	121.6%
Guarantee Company of North America	141.3%

(Loss Ratio - the ratio of claims incurred to direct premiums written, without expenses, commissions and taxes).

A statutory requirement to accurately report premiums and losses by cause of loss would, at some time in the future, provide a base on which to determine premium charges. At the present time, there is no possibility of determining accurately at what level premiums should be, and this results in overcharges in some situations and undercharges in others. Statistical data would be useful in the management of risk.

CLASSIFICATION OF MUNICIPALITIES

The insurance industry is one which is characterized by subsidies between insureds or classes of insureds. In the field of municipal liability insurance, it would be necessary to try to classify the various municipalities into homogeneous groups based on similar characteristics. Within each group, it

is likely that half would be better than the group and half would be worse. Averaging within the homogeneous groupings will create the average rate of premium; and it is obvious that, within the group, one half will be subsidizing the other half. This is acceptable. It is not acceptable for subsidization outside of the homogeneous group, as this could result in municipalities with very dissimilar characteristics subsidizing one another.

Unfortunately, at the present time, most municipalities are aware of their premium levels; however, they may not be aware of their insurers' claim reserves for claims incurred but not paid as this information is usually considered highly confidential. Frank Cowan and Company Ltd. and OME Insurance Brokers Ltd. have offered to provide the information that they have available.

SOURCES OF MUNICIPAL LIABILITY INSURANCE

Market rationalization, which began in 1981, has resulted in the municipal liability insurance market being reduced to two main suppliers. Frank Cowan Company Limited, a risk management brokerage firm specializing in Municipal and School Insurance, insures 70 per cent of the municipalities in the province. According to information supplied by this broker, the following figures represent the premium earned and losses incurred over the past five years for the business that they supervise:

Year	Earned Premiums	Incurred Losses	Loss Ratio
1985	$ 7,637,733	$10,254,060	134.25%
1984	4,330,815	10,988,779	253.73%
1983	3,689,435	6,975,506	189.06%
1982	3,551,574	6,635,635	186.83%
1981	4,328,748	5,047,606	151.63%
	$22,538,303	$39,901,586	177.04%

The broker also reports that, because of the continuing losses, premiums in the municipalities they administer have increased by 50 - 300 per cent, depending on the class of municipality. The two companies that are used as underwriters for this class are the Guarantee Company of North America and the General Accident Assurance Company of Perth Scotland. The Guarantee Company is the thirty-fifth largest insurer in Canada, with assets of $170 million. General Accident is a major world-insurer, the eighth largest insurer in Canada, with worldwide assets of $5.3 billion. The broker advises that these underwriters have committed their resources to municipal insurance and have given assurance that they will remain in this field on endeavour.

The program provided by Frank Cowan Company Limited provides for a maximum limit of liability insurance of $10 million. This coverage is layered, with the first $2 million being underwritten by the Guarantee Company of North America and the balance of $5 million being underwritten by the General Accident Assurance Company. Special reinsurance arrangements

may be made with the Cowan Company to $20 million, under certain conditions.

The other major source of municipal liability insurance is the ROMA Insurance Program Inc., administered by OME Insurance Brokers Ltd. The program is available to all Ontario municipalities with a population of 25,000 or less and there are currently 260 municipalities in the program.

While this program was introduced in 1979, it did not gain general acceptance until 1981; and the information from this source will not be statistically significant until a longer time series is available.

The three companies that are used for this program are Scottish and York Insurance, a Canadian publicly-traded insurance company. The Scottish and York is the eighty-sixth insurance company in premium volume in Canada with total assets of $153 million. The Kansa General Insurance Company of Finland is the sixty-first insurance company in Canada with world-wide assets of $510 million and the Zurich Insurance Company of Switzerland, the thirteenth general insurance company operating in Canada, is a major world-wide insurer with assets of $7.24 billion.

The ROMA Insurance Program Inc. provides for a maximum limit of liability insurance of $10 million. The first $1 million is provide by Scottish and York, the next layer, from one million

to five million, is provided by Kansa Insurance Company and the final layer of five million to ten million is provided by Zurich General Insurance Company.

The twelve municipalities, not insured with either of the two main suppliers that the Committee is aware of, represent less than 5 per cent of premiums, and are variously insured by Allstate Insurance Company, Royal Insurance Company, Zurich Insurance Company and other major suppliers of liability insurance. This group is involved in larger municipalities but they could not be considered as significant municipal liability insurers.

Two major municipalities, Scarborough and Mississauga, are insured for municipal liability: Scarborough with Allstate Insurance Company has a $1,000 deductible; Mississauga with Frank Cowan Company Limited has a $100,000 deductible. The use of deductibles or self-insured limits, is most desirable as that removes smaller claims and so-called nuisance claims from the insurance contract, thus providing insurance for the higher limits at a slightly reduced cost. The greater the self-insured amount, the greater the premium saving should be.

Where a municipality has substantial assets and a significant tax base from which to operate, it may be in the municipality's interest to become active self-insurers as was done in the Metropolitan Toronto area. Care must be exercised to determine that the soft costs and self-insured layer costs do not exceed

the contract costs that might be anticipated from the insurance market. Administrative, investigative and legal costs may create an additional cost burden to be added to the self-insured amount which, if not monitored closely, will soon absorb any savings that might be anticipated.

The following remarks on the Metropolitan area municipalities were included in OME Insurance Brokers Ltd. presentation to the task force:

> "Commencing on January 1, 1980, Metropolitan Toronto and the area municipalities of East York, Etobicoke and Toronto tendered simultaneously for individual and group premiums for their various liability insurance requirements. These original four participants agreed to a Group Program and shared a $4,000,000 aggregate deductible for the four years 1980/1983. The City of York joined the Group Program on January 1, 1984. During 1984 and 1985 the Group shared the total cost of a deductible of $50,000 each accident. The combination of unavailable coverage and unacceptable cost resulted in the group of five reducing their liability insurance purchase from:
>
> 1985: $100,000,000 per occurrence after self insurance of $50,000 per occurrence to,
>
> 1986: $5,000,000 per occurrence after self insurance of $5,000,000 per occurrence. The Group has reserved a total of $7,500,000 for ultimate claims costs for accidents happening in 1986. This total includes development and trend factors of up to three times the existing statistics for 1980/85 claims.
>
> Collection and development of claims statistics, insurance market liaison and certain administrative and risk management functions are contracted to OME Insurance Brokers Limited on a fixed fee basis."

GENERAL REMARKS

While the current availability of municipal liability insurance would appear to be somewhat restricted, in actual fact, there is not a problem of availability but rather a genuine concern with price.

Unlike automobile insurance, where very large homogeneous groups of drivers provide actuaries with definite patterns of trend and severity, and consequently an ability to forecast future costs with a reasonable degree of accuracy, there is not this homogeneity of risk in municipal liability exposures. Neither are there sufficient claims in any possible grouping to provide reasonable accuracy in forecasting costs.

Despite this restriction, insurance organizations that agree to underwrite a municipality's liability insurance must attempt to arrive at premiums in advance which will contemplate the eventual cost of all the municipalities that they insure. Since the principle of insurance depends on the transference of risk, in the case of municipal liability insurance, it depends on the transference of municipal risks to a single pool, so that the losses of the few are spread over the premiums paid by many.

The premiums therefore depend on the ultimate anticipated cost; this has been a moving target as legislative and judicial changes have rendered past experience more and more

unreliable. As was noted earlier, there is a considerable time-lag between the occurrence of the original incident from which the claim arose and the ultimate disposition of the claim, whether by judgement or agreed settlement.

In the case of serious bodily injuries, the claim cannot be settled until the ultimate prognosis of the claimant can be determined. This may extend over a period of time, during which surgical procedures may be required. Therapeutic rehabilitation may also be needed; and, until treatment has been well advanced, it may be impossible to determine the future capabilities of the claimant and the ultimate cost of the damages suffered.

If the claimant makes a decision to pursue the claim through the courts, this will create further delays, increase legal costs and increase the cost of prejudgement interest.

Despite this outlook, the insurer is required to record, as a claims liability reserve, the anticipated final cost of the claim. Since a claimant's recovery from injuries may vary widely depending on age, previous health history, family history and so on, the insurer may have to adjust the initial reserve either upwards or downwards as time progresses. The accuracy of a claims reserve is measured against the amount of the claim eventually paid, when an insurance organization is being audited by its external auditor or the office of the

Superintendent of Insurance. Continued evidence of under-reserving would eventually lead to insolvency.

The claim reserving technique is a requirement of federal and provincial departments of insurance and is in accordance with Generally Accepted Accounting Principles as required by the Canadian Institute of Chartered Accountants. There is always a marked difference between "paid" and "incurred" claims due to the time-lag between the initial establishment of the claim reserve and the eventual payment. To report only "paid" claims would be similar to recording only the annual payments on a mortgage as the mortgage liability when, in fact, the total liability remains until it is disposed of.

There would appear to be no "quick fix" to pricing because, as in all forms of liability insurance, the end cost of the product cannot be determined at the time of sale. The end price may not be determined for several years or until the last claim has been settled.

To a large extent, costs reflect the rules of conduct imposed on society by legislation and the courts of law. These will be enlarged upon later in this document but, in order to change the costs, it is necessary to avoid the events that precipitate these costs. This may be achieved to a certain degree by prudent risk management, but this, too, is fallible.

What is lacking, and was previously referred to, is an adequate data base on which to predicate losses and manage the risk exposures. A system to provide the data is already in place within the insurance industry.

There is a reasonable expectation that, given a proper statistical base from which to operate, the number of suppliers to the market would increase; because lack of adequate information, and thus a fear of the unknown, are the probable causes for prudent underwriters to avoid underwriting municipal liability insurance.

In order to assist municipalities in grading their suppliers of insurance, it is recommended that they obtain the "Trac Report" from Colander Publications Ltd., P.O. Box 201, Station P, Toronto, Ontario M5S 2S9. This report grades the financial condition of all federally licensed insurers using several internationally recognized standards. This report is generally recognized by insurance companies and insurance buyers as an early warning of possible problems or, conversely, a clean bill of health of the company being reported upon.

CHAPTER THREE

THE PROBLEMS - IDENTIFIED AND DIAGNOSED

INTRODUCTION

The Advisory Committee began its deliberations on February 20, 1986. Although the Committee members had their own prior perceptions of the problems being experienced in respect of municipal liability insurance, those perceptions were considerably clarified, augmented and given perspective by the many excellent presentations to the Committee.

What became evident early in the discussions, and has been treated in detail in the preceding chapter, is that there have been considerable losses in the liability insurance business for at least the last five years. Like any other industry faced with comparable losses over a period of time, the most immediately available solutions are to increase prices (premiums), decrease the amount of product (liability insurance coverage) available at a given price, or get out of that particular product line or some combination of these. The liability insurance business is no exception and has implemented all of these solutions.

However, these "solutions" to the losses faced by the insurance business have become the problems of the customer, in the context of this report, the municipalities of Ontario. In this

chapter, we shall first discuss these solutions or problems, as they were, depending on the viewpoint of the reader. Attention shall then be directed to the more basic problems being faced and that have given rise to the losses in the first place. The solutions to these are more difficult to deal with and the time-lag in implementing such solutions is often more protracted.

TWO BASIC PROBLEMS FOR MUNICIPALITIES

Premium Levels

As mentioned earlier, the Committee has learned that, to date, by far the majority of municipalities in the province experienced premium increases of between 50 and 350 per cent for their 1986 liability insurance coverage. One of the two major brokers confirmed across-the-board increases in municipal premiums of 50 to 75 per cent for villages, 100 per cent for townships, 100 to 250 per cent for towns, and 300 per cent for most cities and regional municipalities. The other major broker revealed that municipalities dealing with his company faced across-the-board increases of 350 per cent for 1986, which were dictated by the insurance company and were not subject to negotiation. In the former case, it was indicated that premium reductions could be achieved by those willing to increase the size of their deductible and/or by reducing the amount of coverage.

Based on information supplied by these brokers, municipal liability premiums written in 1985 totalled approximately $14 million, excluding the Metro Group. These will increase by $16 to $21 million or more than double in 1986 to between $30 and $35 million.

In the overall municipal context, disregarding the Metro Group, this increase in liability premiums would not present an insurmountable problem to the municipal sector. It represents less than 0.3 per cent of the municipal sector's estimated $6.3 billion in revenue fund expenditures for 1986.

However, from a municipal budgetary perspective, the sudden increases experienced have been difficult to absorb. To accommodate premium increases of this magnitude, councils must reorder local priorities and/or increase mill-rates. Both these impacts are painful to municipal politicians and difficult to justify to local ratepayers, particularly when it can mean a 6 per cent increase rather than a 5 per cent increase in property taxation.

In defence of the industry's position, the Committee has heard that premiums have been depressed below the late 1970s break even level for several years now, and that municipalities are witnessing a return to more realistic premiums commensurate with today's costs, albeit all in one or two years. As detailed in chapter two, the statistics for Frank Cowan Company Limited showed the loss ratio on municipal liability business

handled by the company between 1981 and 1985 to be in excess of 177 per cent. For every dollar of premium taken in, $1.77 was paid out. Although the municipal loss ratio for the same period is not available for Scottish and York, in 1984, the company paid out $1.22 for every premium dollar taken in.

It is evident that municipalities have been subjected to widely varying and admittedly arbitrary premium increases. Variables, such as claims history, whether or not risk management programs are employed and the number of years of dealing with a specific company, did not appear to have a bearing on the premium increases charged individual municipalities in 1986. Industry representatives readily admit to this fact but suggest that these variables played a significant role in determining each municipality's base line premium level before the current crisis evolved.

At this time, the Committee cannot pass judgement, one way or the other, on the validity of the premium increases the municipal sector is currently witnessing. However, the Committee continues to recognize that municipalities generally view the increases as being excessive, if not unwarranted, given their individual claims history.

Levels of Available Coverage

As mentioned in chapter two, the standard municipal coverage available in Ontario in 1986 is $1 to $2 million in primary

insurance with total coverage of up to $10 million. The Committee has been told that more coverage may be available for a price. This inevitably leads to the question of how much coverage is enough? In the past, this question did not require much pondering. If a council was uncomfortable with its existing coverage, for a relatively small premium, it bought more.

Excess coverage has historically been offered to protect against the eventuality of that unpredictable accident which results in a large number of claims, usually referred to as a "disaster". The term disaster can be associated with natural events such as tornados and earthquakes, as well as those caused by man. Municipalities can only be held accountable for their contribution toward man-made disasters. Although the odds appear slim that the average municipality will be involved in a major catastrophe, most councils feel compelled to safeguard against this eventuality. Some are uneasy about being unable to secure as much coverage as they had in previous years. The fact that the present level of coverage may be more than sufficient does little to allay the uneasiness. At present, there is no way of knowing how many disaster claims have occurred in the past.

While the Committee believes that municipalities should not be forced to pay exorbitant premiums to protect against the possibility of a disaster occurring, it also believes that

they should not be exposed to potential financial ruin as a result of one event.

Although substantiating information on awards and, in particular, out-of-court settlements is not yet readily available, the Committee has identified two problematic questions respecting disaster level coverage that require attention. These are:

- What is an adequate level of coverage for municipalities, given their potential risks short of a disaster? and
- Can the existing insurance market meet these requirements at a reasonable price?

Another reported problem has been the lack of coverage for some municipal risks. Outside of certain environmental impairment risks, such as landfill sites that either have not obtained the required engineering assessment or have failed to pass it, the Committee has not identified any other class of risk that insurers are refusing to cover. There are possible exclusions arising out of Part IX of the Environmental Protection Act (the "Spills Bill"). At this time, there is considerable debate and not enough concrete evidence to properly evaluate this claim.

REASONS IDENTIFIED FOR THE CURRENT CRISIS

The rest of this chapter deals with the various reasons why the insurers have been losing money in the municipal liability

market. The problems of municipal risk exposure and the evaluation thereof are also discussed.

MUNICIPAL LIABILITY INSURANCE MARKET

The number of companies involved in the municipal market in Ontario today is very limited. The Committee understands that when tendering or calling for quotes on their insurance needs last year, few municipalities received complete quotes from any source other than the company providing their existing coverage.

Approximately 70 per cent of the 839 municipalities in Ontario buy their insurance through the Frank Cowan Company while 260 municipalities use the ROMA Insurance Group. Other than the Metro Group, which includes Metropolitan Toronto and four of its six area municipalities, the remaining dozen or so municipalities in the province secure their insurance from other insurance companies including Allstate Insurance Company, Royal Insurance Company and Zurich Insurance Company, which have also been involved for many years in the coverage of a few municipalities.

To our knowledge, these latter companies are not actively looking to increase their municipal business now. The Committee has also learned that Scottish and York is reluctant, at this time, to take on any new municipal clients that have populations in excess of 25,000.

This would suggest to the Committee that competition exists, albeit between two brokers, for that portion of the municipal market having populations of roughly 25,000 or less, but that alternative sources of coverage for the 99 municipalities in Ontario with populations that exceed this threshold, is difficult to find in today's market.

The Committee believes that there are too few insurance companies willing to compete in a market which is significant both in terms of its size and in terms of its future potential, given that municipalities have, and will continue to have, considerably more corporate stability than a significant number of private corporations.

As a final comment, the Committee does not subscribe to the notion, voiced by some members of the insurance industry in the media, that the municipal sector is partly responsible for the lack of competition in the municipal liability insurance market because it has tendered or requested quotes for its insurance needs in the past. This statement implies that municipalities should have dealt with one specific company regardless of cost, if that company provided adequate service in the past.

GLOBAL MARKET IMPACTS

The international liability insurance market has been beset with disasters, both natural and man-made, in recent years. To say that the Ontario municipal insurance market, or for that

matter, any other insurance market, is not paying the price for past international insurance disaster claims or American product liability claims is difficult to accept.

The reinsurance industry has, in effect, rationed a portion of its existing capacity among its Canadian clients. Thus, primary insurers are being forced to carry a larger share of the total risk than they have historically. Charged substantially more for significantly less coverage by the reinsurers, Ontario primary insurers must pass the burden on to their clients.

The Committee believes that the Ontario municipal insurance market is much less a risk than many existing markets in the world and is attempting to secure the historical claims information to prove this point.

Even with this information, however, the problem remains of how to insulate the Ontario municipal insurance market from that of the rest of the world, so that the premiums paid reflect the settlements incurred within this market alone.

THE JUDICIAL SYSTEM

Various comments in the media and briefs to the Committee have characterized the judicial system in Ontario, and in particular, some of its judges, as being irresponsible and overly generous in their findings for the plaintiffs in

liability suits. The comments most widely mentioned can be summarized as follows. The courts are:

- finding for the plaintiff even where no hard evidence of negligence can be established;
- looking for a deep pocket to provide money to plaintiffs who have been disadvantaged;
- guilty of misinterpreting insurance policy conditions;
- turning Ontario into the "California of the North";
- handing down huge and irresponsible awards; and
- handing down judgements lacking in predictability.

The Advocates' Society, in its brief to the Ontario Task Force On Insurance, defends Ontario's judicial system. They express the opinion that although judges have been known to err from time to time, there are Courts of Appeal available to test the judgements of lower courts. They also make the point that, in the past, most awards that surpass the $1 million mark have involved medical malpractice cases that draw from a medical insurance pool and do not affect the regular liability insurance system.

This may be true, but the counter-argument is that by far the majority of settlements in liability insurance cases are made out of court. The relatively few awards made in the courts are used as the precedents for these settlements, and as such, stability in the liability insurance market is threatened by judgements that alter long-standing concepts of fault or that grant unusually large settlements.

The Committee is reluctant to find fault with the Ontario Judiciary system. Although there is a system of appeals in place to obtain a second opinion, appeals take time and cost money. Many judgements against municipalities remain unchallenged because of the potential costs involved, with no guarantee of success.

The Committee feels that large awards are more likely to be a product of the laws currently in force than of those hearing the evidence.

COURT AWARDS AND OUT-OF-COURT SETTLEMENTS IN ONTARIO

Through discussions with the two brokers responsible for providing the insurance coverage for all but a few municipalities in Ontario, the Committee has discovered that, other than the celebrated McErlean case involving Brampton, the Committee knows of no other liability settlements involving Ontario municipalities that have exceeded $1 million. Although no liability award has exceeded the $100,000 mark in the history of the ROMA program, there are presently 51 cases on the Frank Cowan Company's books where the statement of claim is in excess of $1 million.

The Committee believes that large settlements, such as that awarded in the McErlean case, both here and abroad, have had a profound effect on the public's awareness of the courts as a means for potentially recovering losses. Although the

potential for large awards is a major cause for concern for the insurers, there are other changes that have had a significant impact on their profitability in the municipal market. These include:

- the increased frequency of suits being filed by the public in general;
- the frequency with which municipalities are being named as a third party in claims because they own the land, building or road where the accident occurred; and
- the fact that the awards paid out to settle the most common types of claims may have grown considerably faster than inflation in recent years.

COST COMPONENTS OF SETTLEMENTS AND AWARDS

Information on the breakdown of the cost components of settlements and awards was requested in Part II of the Survey sent to all municipalities. In addition to the actual settlement amounts paid, municipalities face other defence-related costs, such as legal and adjusting fees, and administrative costs, that can exceed the actual amount of the awards.

The Committee will review the information provided by municipalities and their insurers with a view to identifying the relative importance of the various components of awards and whether their relationship has changed in the 1981 to 1985 period.

MUNICIPALITIES AND THE LAW

One of the most often mentioned causes for the current liability insurance crisis is the impact that the tort system has on both the size of settlements and the obligations and liabilities placed on the suppliers of goods and services. Municipalities, as major suppliers of a wide variety of public services, are particularly vulnerable.

A tort involves a civil action where a plaintiff (the victim), seeks compensation from the person who was negligent (the defendant) and caused the loss. The award must be sufficient to compensate the victim for all losses incurred.

The Committee has reviewed a number of statutes which have been mentioned as possible problem areas for both the insurers and the insured. In general, they can be divided into one of two types:

i) those that increase a municipality's exposure to risk; and

ii) those that affect the size of the award paid out.

The following is a summary of the Committee's findings with respect to the statutes most often mentioned. A more complete summary of each is contained in Appendix B.

STATUTES INCREASING MUNICIPAL EXPOSURE

Family Law Reform Act

Replaced this year by the Family Law Act, this Act legislated the common law right to claim for out-of-pocket expenses and loss of care, guidance and companionship. It effectively increased municipal exposure by broadening the right to compensation to include parents, children, siblings, grandparents and grandchildren. The new Family Law Act should cut down on the number of frivolous claims made by removing the requirement that all claims must be represented in a single suit.

Limitations Act

Bill 160 proposed changes to the Limitations Act, in December 1983, that would have significantly increased municipal exposure to liability suits by changing a number of existing municipal limitations periods. The Attorney General's office is currently reviewing the contents of Bill 160 and has expressed a willingness to consider municipal concerns.

The Negligence Act

In the event that one or more of the defendants found guilty of contributory negligence cannot pay their share of an award, the "jointly and severally" provision in this Act ensures that all

remaining guilty defendants meet the shortfall to the best of their ability. To safeguard against a shortfall, a plaintiff's lawyer will routinely add to the list of defendants anyone who may remotely have contributed to the accident. Consequently, municipalities are often named in auto, and other bodily injury suits where municipal property is involved, largely because of their ability to pay.

Occupiers' Liability Act (OLA) and Trespass to Property Act (TPA)

A number of municipal representatives believe that these two Acts increased municipal exposure to claims when, in fact, they replaced the common law "duty of care" responsibilities.

Section 4 of the OLA actually reduces the occupier's duty of care for rural and recreational properties. In these cases, the individual entering the property is deemed to have willingly assumed all risks. The occupier, on the other hand, owes only limited duty of care:

a) "to not create a danger with the deliberate attempt of doing harm or damage to the person or his property"; and

b) "to not act with reckless disregard of the presence of the person or his property".

What appears to have happened is that, as society has become more suit conscious, municipalities have faced more and more suits resulting from bodily injuries occurring on their

property. The Committee acknowledges that the current requirements to post signs on rural municipal properties not only poses a significant cost to many small municipalities but is also impractical for those municipalities that have few employees and own large tracts of unused and forested lands.

Environmental Protection Act/Part IX

Part IX of this Act, commonly referred to as the "Spills Bill", prescribes when and how compensation claims can be made in the event of a spill of a contaminant into the environment.

The Committee has heard from a number of individuals representing the views of the insurance industry, private industry, the legal profession, and the municipal sector. The Committee recognizes the limited experience to date in the application of this legislation.

For the most part, the comments the Committee has heard regarding the legislation itself and the Association Pool have been negative. At best, both may meet all municipal concerns and needs in their present form; but if so, neither has been sufficiently explained to the municipal sector to gain its support.

STATUTES AFFECTING THE SIZE OF AWARDS

Courts of Justice Act

1) Prejudgement Interest

This Act replaced the Judicature Act in January, 1985 and contains the provisions that govern the determination of prejudgement interest on awards. Prejudgement interest can only be awarded for past, not future economic losses. Although insurance companies claim that prejudgement interest has added greatly to the cost of claims, it should be noted that most settlements are made out of court and prejudgement interest is invariably compromised.

2) Structured Settlements or Periodic Payments

Before Section 129 of the Courts of Justice Act was enacted, the courts did not have authority to permit periodic payments for any part of a plaintiff's award. Now, if all affected parties consent, a judge may order the defendant to make periodic payments for all or any part of the award. Under most circumstances, the counsel for the plaintiff will opt for a lump sum award. In the McErlean case, over $3 million of the lump sum award was a gross up for income taxes to be paid on the future investment income earned on the award.

For lump sum awards, the judge must also make provisions for the cost of future care in bodily injury cases. Since these costs are difficult to ascertain, insurers believe there is a tendency on the judges' part to award on the high rather than the low side. Insurers also contend that lump sum awards increase the initial cost of awards and that these costs must be recouped through liability insurance premiums. Structured settlements may reduce the overall cost of providing insurance without reducing the level of future care for the victim.

HEALTH INSURANCE ACT

Section 36 of this Act gives the Ontario Health Insurance Plan (OHIP), the right to bring action to recover both past and future health care costs for any person, insured by OHIP, who is injured as the result of the negligence or other wrongful act or omission of another. These rights are referred to as "subrogation rights".

While past OHIP costs are readily identifiable, future OHIP costs, as part of the future care costs, are somewhat less predictable and can add substantially to the size of an award.

Under the Automobile Insurance plan in effect in Ontario, plaintiffs do not include medical costs when suing for damages. OHIP recovers its costs from the companies providing automobile insurance. A portion of the bodily injury and

personal damage premiums paid (2.4 per cent in 1984), is collected by the Insurance Bureau of Canada for OHIP.

OTHER RISK EXPOSURES

The liability exposure in any municipality is extensive, certainly unpredictable in many cases and decidedly non-static. The broad spectrum of services is a critical determinant; furthermore, the delivery of many of these services through various boards, commissions, committees and volunteer groups complicates the issue. These facts play a key role in the current reluctance of insurance companies to provide broad general municipal liability coverage. The companies contend that the degrees of risk exposure are unquantifiable, a fact that they appear to have just realized.

Provision of Services

The diversity of the services provided by municipalities has been outlined earlier in this report; however, it may be useful to address a few of the more common areas of exposure and discuss, briefly, the role the Province has played in increasing the exposure of municipalities.

Parks and recreation exposures are considerable. Arenas and other sports facilities, children's play equipment, beaches and the unusual types of exposure involved in special events, such as races, parades, carnivals and musical concerts are all areas

of high risk and, therefore, of particular concern to the insurance industry.

Accidents arising from the use of roads and sidewalks in municipalities present perhaps the greatest frequency of claims. In particular, municipalities are being named in more and more bodily injury claims arising from motor vehicle accidents for contributory negligence for such things as missing or obstructed stop signs, poor road design and inadequate maintenance of road surfaces.

Potentially dangerous activities such as rock climbing, scuba diving etc., when conducted by a municipality, provide further potential for excessive liability risks. In addition, the very nature of the geography of some municipalities often presents risks. Closed landfill sites, having been or in the process of being converted for recreational purposes, can be particularly risky, as the City of Brampton has discovered. Municipalities also own large tracts of forest lands. These lands are often used for a variety of recreational purposes, which the municipality may or may not sanction. Due to the sheer size of these lands, it is virtually impossible to implement any credible type of surveillance, lighting or signing. Yet, the ultimate liability for accidents occurring on these properties remains with the municipality.

It must be acknowledged at this point that the Province has also played a role in increasing municipal exposure. For

instance, the introduction of regional governments resulted in the creation of regional police forces responsible for policing rural areas formerly handled by the Ontario Provincial Police. The operation and ownership of water and sewer plants has been transferred to the municipal level. Social services programs, although largely provincially funded, are generally municipally operated. Each of these changes, and this is by no means a complete listing, has transferred further risk exposures to the local level. This is not to say that the devolution of responsibilities to municipal governments is a bad thing; just that it does increase their liability.

Local Boards, Commissions, Committees and Volunteer Groups

The services provided by local boards, commissions, committees, and volunteer groups established by municipalities to discharge specific functions on their behalf, tend to increase municipal liability exposure. First, they spread the decision-making structure to municipalities, and second, they make possible the provision of a greater number and magnitude of services.

Their size, function and power vary considerably. A Police Commission's legislated powers include the authority to pass certain by-laws and to generally act quite independently. The responsibilities of boards and commissions frequently extend beyond individual lower and upper tier boundaries. Committees, on the other hand, which are responsible for such areas of

activity as finance, public works, protection, cultural and social services, have no ultimate authority. Homes for the Aged, Children's Aid Societies and Health Units generally follow county boundaries in southern Ontario and district boundaries in the north. All of these factors contribute to complicating the issue of liability.

Financial control of the operations of boards, commissions and committees varies from municipality to municipality but most often their budgets are approved by the local council. Although some decisions may be appealed to the Province, by and large, the ultimate responsibility for their actions, activities, land, facilities and services rests with the local municipality. Non-profit, charitable and other philanthropic groups services may also fall under the municipal liability umbrella. Aside from the attendant liabilities of their actions, where these services are discontinued due to inadequate insurance coverage, municipalities would, in many cases, be forced to pick up the entire cost and provision of the important services they provide.

These added and often indirect responsibilities serve to further increase an already excessively large degree of municipal liability exposure.

Non-Homogeneity

The non-homogeneity of municipalities makes their risks difficult to quantify from the insurers' perspective. There are no standards for the type, extent, potential or frequency of municipal risks in general. The widely differing services, size, terrain and risk management standards of municipalities make evaluation of their risks particularly difficult.

Municipalities differ significantly in size, structure and geographical nature and bear diverse authority and responsibility for services, land and facilities. Depending on their status, neighbouring municipalities may offer totally unrelated types of services and/or the same services at different levels. Consider the difference of the attendant risks of policing among a regional force, a one-city force, a one or two-officer force, or an area under contract with the Ontario Provincial Police.

Further, the population, area and geography of a municipality can vary substantially, particularly between the north and south. Large urban areas, such as Metropolitan Toronto, could potentially attract infinitely more and larger types of claims than a rural municipality of equal size.

In addition, some councils have established risk management systems and have implemented inspection, law enforcement, and public awareness programs. Some others have, in the past,

simply sought and obtained liability coverage at the lowest possible cost and exhibited a lackadaisical attitude to reducing exposure. Still others, have an implicit or built-in risk management system of local ratepayers who quickly and effectively alert municipal officials of potential problems.

How does an insurer begin to establish standard criteria for evaluating these varying risks and varying levels of responsibility and success in managing risk?

It has been suggested to the Committee that by pooling their resources in a self-insurance program, or a reciprocal exchange, municipalities could reduce the uncertain and uncontrollable aspects of the current liability situation. However, the very nature and diversity of municipalities raises many questions about this approach. Whether or not it is possible to group municipalities into homogeneous groups for insurance purposes and whether municipalities would want to share all the risks of such groupings would have to be investigated.

However, it is quite clear that, both of their own accord and at the insistence of the insurance companies, municipalities are becoming increasingly aware that in today's scenario, a strong emphasis on loss control and safety at all levels of management may be a primary key to making their considerable risks more attractive for insurance purposes.

STANDARDIZATION

As pointed out in chapter two, reliable historical insurance information does not exist in aggregate for municipalities and what is available on an individual municipal basis is difficult to obtain in any comprehensive manner.

Municipalities, while aware of their premium levels, often do not have ready access to information on their paid claims and seldom, if ever, are privy to their insurers' reserves for claims incurred but not yet paid. Insurance companies are not required to conform to any sort of statistical reporting procedures for municipal business.

By comparison, the automobile insurance industry is under a statutory obligation to collect and store policy data in a standardized/regulated format to facilitate their reporting to the Superintendent of Insurance. Detailed and comprehensive analysis and reports are then readily available.

Not only do liability insurance policies differ significantly among municipalities and among insurance companies, but among municipalities using the same insurance company. They tend to be difficult to read and to interpret. Municipalities often find it difficult when calling for tenders or quotes on their insurance business, to interpret the significance of different bids due to the variances, both slight and major, of the policy

wordings. Comparisons between municipalities are even more difficult. Again, by comparison, the automobile insurance industry is required to use legislated standard policies and clauses.

While municipalities are by no means homogeneous, there are a number of risks that are common to all municipalities in Ontario, albeit some are more palatable than others. Those standard types of risk could be identified in standard policy clauses, as they are by automobile insurers.

The Committee has identified problems with respect to the lack of standardization of data collection, reporting and policies.

CHAPTER FOUR

RECOMMENDATIONS

PREMIUMS AND COVERAGE

The Committee has established that all municipalities in Ontario presently have liability insurance coverage, albeit the Metro Group is self insured up to $5 million per claim. Obtaining basic levels of coverage is not a problem for most municipalities at this time. From a municipal perspective, the key questions are affordability and the level of coverage required. The Committee has determined that there are no "quick fixes" for the current problems facing municipalities. A survey has been distributed to all municipalities requesting historical statistics to aid the Committee in:

- determining whether the current premiums are justified, given municipalities' claims experience;
- determining whether or not there are viable alternatives to the existing markets. (The Honourable Monte Kwinter, Minister of Consumer and Commercial Relations, has suggested that reciprocal exchanges may be a viable alternative. The Metro Group participates in one, Metropolitan Toronto School Boards are in the process of establishing one, and the Ministry of Education is studying the possibility for other school boards.);

- establishing a data bank of existing municipal claims, premiums, etc., information to provide a basis for further analysis.

The Committee recommends that the Provincial Government fund a study dealing with the information provided in the Municipal Liability Insurance Information Survey that would perform the aforementioned tasks and such other tasks as the Committee deems appropriate.

DISASTER COVERAGE

The Committee believes that municipalities should not be required to insure for the eventuality of a "disaster" that could place an unrealistic strain on their fiscal capacity. True disasters involving multiple claims and horrendous injuries occur rarely and should be considered above and beyond municipalities' normal exposure. The study commissioned should determine an appropriate level of operative insurance for municipalities, exclusive of disaster level coverage.

The Committee recommends that the feasibility be determined of establishing a fund that would remove the necessity of purchasing coverage in excess of an operative level of insurance.

REINSURANCE

Reduced reinsurance coverage, provided by international companies, has been identified as a major contributing factor to increased liability insurance premiums. Late in February of this year, the Honourable Monte Kwinter, Minister of Consumer and Commercial Relations, suggested that the Canadian Insurance Exchange, first proposed in November 1982, could be operative as early as January 1987. The Exchange would start with approximately $200 million in capital supplied by about 30 syndicates. Such an Exchange could eventually prove to be a successful means of insulating the municipal liability market from foreign risks.

The Committee recommends that the Minister of Consumer and Commercial Relations move quickly to establish the Canadian Insurance Exchange.

MUNICIPALITIES AND THE LAW

Limitations Act

The Committee strongly recommends that the Attorney General consider municipal concerns, as expressed in a resolution of the Association of Municipalities of Ontario (AMO), when re-drafting the Limitations Act. AMO's concerns include:

- **retention of the three month limitations period for claims based on non-repair of public highways;**
- **retention of current notice provisions for claims based on non-repair of public highways;**
- **"capping" of limitations period for claims brought by persons suffering a disability at 10 years;**
- **exemption from abolition of prescriptive easements for municipalities and public utilities; and**
- **no adverse possession of lands vested in a municipality.**

Negligence Act

Under the tort system, the role of the court has traditionally been to establish and assign responsibility for payment of damages on the basis of each defendant's degree of liability. The "jointly and severally" provision in Section 2 of the Act can effectively alter this fundamental role of the tort system by forcing defendants to assume a larger share of the damages than their share of the blame justifies.

The Committee recommends that the Task Force on Insurance consider a revision of the joint and several liability provision in the Negligence Act that would restore the fundamental concepts of the tort system.

Occupiers' Liability Act (OLA) and Trespass to Property Act (TPA)

Subsection 4 of the OLA effectively reduces the municipal duty of care for recreational and rural lands. However, subsection 4 of the TPA requires that limited permission or prohibition signs be posted. In other words, municipalities may be excluded from the duty of care or liability to entrants of their property by exhibiting or posting prohibition signs disclaiming municipality liability. Fencing or posting signs on all vacant municipal land that is considered vacant or recreational, is both costly and of little real benefit to users of the property. In fact, the only real benefit derived would be to the municipality, in its defence of liability actions against it.

The Committee believes that, much like the speed limit signs that are posted at given points in the municipality advising motorists of the limit, unless otherwise stated, signs limiting permission or prohibiting the use of municipal lands, unless otherwise posted, would be as practical, and substantially less costly than the current requirements.

Environmental Protection Act

The Environmental Protection Act is an important area of concern to municipalities; however, it is a particularly complicated Act and will require considerably more time to

evaluate. The Committee will study the implications of the Environmental Protection Act in view of municipal needs and will make more substantive comments or recommendations in its final report, if it finds them to be necessary. The Committee recognizes that the Environmental Protection Act and the Association Pool, that provides liability insurance coverage for spills, may meet all municipal concerns and needs in their present form; but if so, neither has been sufficiently explained to the municipal sector to gain its support, nor has any specific process for municipal participation been set forth.

The Committee recommends that the Ministry of the Environment undertake an informational campaign for all sectors of the community to provide a better understanding of Part IX of the Environmental Protection Act (Spills Bill) and the Association Pool.

Courts of Justice Act - Structured Settlements

In view of the substantial amounts that gross-ups add to lump sum awards and the vagaries of determining the cost of future care in severe bodily injury cases, **the Committee recommends that the Task Force on Insurance consider revising Section 129 of the Courts of Justice Act to give the courts authority to impose structured or periodic payment settlements for all, or any part, of an award.**

OTHER RISK EXPOSURES

The Committee recognizes the differences among municipalities and the difficulties of implementing a risk management program; however, the Committee believes that to ignore the benefits of reducing exposure would be irresponsible and may well have a detrimental effect on municipalities' marketability for future liability protection.

The Committee believes that whether it be a formal or informal process, it is important for municipalities to actively examine their operations in an to attempt to identify specific hazards that can be removed or minimized.

Therefore, the Committee recommends further investigation in the field of risk management and that educational and promotional programs be made available to the municipal sector, so as to assist in the effective implementation of a risk management program tailored to municipal requirements.

HEALTH INSURANCE ACT

The agreement between OHIP and the automobile insurance industry, whereby medical costs are recovered through bodily injury and personal damage insurance policy premiums, rather than through the courts, has been an effective means of dealing with the medical portion of court awards.

The Committee recommends that the Task Force on Insurance consider a similar system for all liability claims, fully recognizing that it may require some time to establish a credible data base upon which to determine an adequate level of compensation.

STANDARDIZATION

The Committee recommends that a statutory requirement be enacted to establish for municipal insurers a standard system of reporting to the Superintendent of Insurance, similar to that which exists for automobile insurers, in order to provide a consistent statistical base.

The Committee also recommends that the Provincial Government in cooperation with the Association of Municipalities of Ontario and the major municipal insurers, prepare mandatory standard municipal liability insurance policies, that must be used when quoting on all municipal insurance policies.

LEGISLATION REQUESTED

Capping

Many municipalities have suggested that limiting municipal liability or capping the size of awards should be considered as possible solutions to high settlements or court awards. Although the Committee recognizes the necessity of the court-

imposed cap for pain and suffering (currently $184,000), because of the subjectivity involved in quantifying pain and suffering, it believes that there are more effective ways of reducing the size of settlements that do not impinge upon individual rights to recover damages, i.e. structured settlements.

The Committee believes that no further capping is required.

Good Samaritan Legislation

This form of legislation calls for the protection from prosecution of individuals who come to the aid of another in times of need. In the past, studies of this form of legislation have concluded that there was no need for it in Ontario. The Committee contends that these studies predated the current liability insurance crisis and would favour consideration of some form of legislation to include Municipal volunteers.

The Committee recommends that the Task Force on Insurance consider some form of Good Samaritan Legislation that would protect Municipal volunteers.

APPENDIX A

GLOSSARY OF INSURANCE TERMS

GLOSSARY OF INSURANCE TERMS

Abandonment

To give up rights and duties in the item insured. All insurance policies, except Marine, forbid abandonment by the insured of the article insured without the consent of the insurance company.

Act of God

A direct, sudden and irresistible act of nature, such as could not have been foreseen or, if foreseen, its effect could not have been prevented - an inevitable accident, e.g. flood, earthquake, etc.

Actual Cash Value

The current value of an insured article at the time of a loss. This may be the cost of replacing the article with a similar model in similar condition. It may, however, involve the price of the article plus any appreciation or less depreciation since its purchase.

Actuary

A person trained in the "principle of large numbers" and the "theory of probability", who calculates the proper premium rates based on experience and often considers the accuracy of the assessment of reserves.

Adjuster

The person who investigates insured losses and negotiates the settlement of claims on behalf of the insurer. Public adjuster is one who, for a fee, represents policyholders in the adjustment of their losses with insurance companies.

Adjustment

The process of arriving at the settlement of a claim. It may consist of a series of computations in an uncomplicated fire loss or it may involve discussions of the degree of liability, quantum of damages and other matters in problem liability claims.

Agent

The **independent agent** is an independent businessman who represents two or more insurance companies under contract in a sales and service capacity and who is paid on a commission basis. The **exclusive agent** represents only one company usually on a commission basis. The **direct writer** is the salaried or commissioned employee of a single company. Agents are licensed in the province(s) in which they operate.

Aggregate

The dollar amount of insurance coverage during one specified period, usually 12 months, for all insurance losses sustained under a policy during such period.

Appraiser

The person called upon to establish quantum or the extent of material loss resulting from a claim, or to assist in the underwriting of a risk, usually recognized as an expert in his field of endeavour, i.e. real estate, gemologist, automotive or industrial equipment. The **independent appraiser** is an independent businessman who represents many insurance companies, reporting to the adjuster or company. The **staff appraiser** represents one company exclusively and reports directly to that company. The **adjuster's appraiser** usually represents one independent adjuster and reports directly to that adjuster.

Arbitration Clause

Language providing a means of resolving differences between the company and the policyholder without litigation. Usually, each party appoints an arbiter. The two thus appointed select a third arbiter, or umpire, and a majority decision of the three becomes binding on the parties to the arbitration proceedings.

Assignment

The transfer of an interest from one party to another. Insurance policies are personal contracts and are not transferable except by consent of the insurance company.

Binder

An agreement to cover a risk pending the issuance of a policy. It is also known as a "cover note".

Blanket Rate

Uniform premium rate for everything insured under one policy. It may involve several properties.

Boiler and Machinery Insurance

Coverage for loss arising out of the operation of pressure, mechanical and electrical equipment. It may cover loss suffered by the boiler and machinery itself and may include damage done to other property, as well as business interruption losses.

Bond

A bond issued by an insurance company generally protects an individual or corporation, known as an obligee, from loss arising out of the acts or failure of another, known as the principal. Basically there are two types of bonds - surety bonds and fidelity bonds.

Broker

A marketing specialist who represents buyers of property and liability insurance and who deals with either agents or companies in arranging for the coverage required by the customer. Like the agent, the broker is licensed in the province or provinces in which he conducts his business.

Building Rate

The fire insurance rate on a building (real property) as distinct from the rate on the stock or contents, etc.

Cancellation

The termination of the policy before the end of a policy period. Usually if the company cancels the policy, the insured is entitled to a pro rata return of premium for the unused portion of the policy. If the insured cancels, he is entitled to a reduced refund of premium.

Casualty Insurance

The group of coverages which includes insurance against liability claims and almost all other types except fire, marine and life.

Claim

The amount of money set aside by an insurance company for a reported claim that has not been settled.

Claim Reserve

The amount of money set aside by an insurance company for a reported claim that has not been settled.

Co-Insurance

A clause in an insurance policy providing for the sharing of the loss unless the policyholder maintains insurance on his property or contents up to a stipulated percentage of its value.

Comprehensive Automobile Insurance

This type of automobile insurance provides coverage to repair your car when it is damaged in circumstances other than by a collision, e.g. fire, theft, vandalism, glass breakage, etc.

Compulsory Automobile Insurance

Many jurisdictions in Canada and the U.S.A. require evidence of the existence of valid third party liability automobile insurance before a motor vehicle permit will be issued or renewed. In some jurisdictions, accident benefits and collision coverages may also be compulsory.

Concurrent Insurance

Where two or more insurance policies are alike in all material aspects, both insurance policies apply concurrently to the loss and are known as concurrent insurance.

Contents Rate

The rate set for insurance on the contents of a property rather than the building itself.

Cover Note

An agreement to cover a risk pending the issuance of a policy. It is also known as a "binder".

Daily Report

The insurance company's (or agent's) record of the policy. It usually includes the application, the carbon copy of the typewritten parts of the policy and the endorsements. It omits the cover form and lengthy portions of the policy which are standard to the particular company's policy of that type.

Damages

A sum of money claimed or awarded as compensation for loss or injury.

Deductible Clause

Some policies are written to pay only after the policyholder has himself suffered an agreed amount of loss. The amount which he must lose first is "deducted" from the total of the damage to determine the amount the company must pay and thus becomes the "deductible".

Effective Date

The date at which the protection becomes effective.

Endorsement

An endorsement is a modification which is added or attached to an existing policy.

Estoppel

The legal bar raised by one's own actions against asserting a right which once existed. See also "Waiver".

Excess Insurance

Excess insurance means insurance which becomes effective only when the loss is in excess of a certain amount or where it is in excess of the basic policy.

Ex Gratia Payment

A payment made for which the company is not liable under the terms of its policy.

Expense Ratio

The percentage of premium used to pay all the costs of acquiring, writing and servicing insurance.

Expiration

The date set in the policy when it is to expire.

Exposure

The hazard threatening a risk because of external or internal physical conditions.

Extended Coverage

An endorsement that enlarges the coverage afforded by the policy. In fire policies, the "Extended Coverage" adds still more perils such as accidental leakage of plumbing and heating systems, vandalism, etc.

Financial Responsibility Law

A statute which requires motorists to be able to establish their financial ability to pay losses up to a certain minimum dollar limit. The most usual form of proof is an insurance policy. This law assures availability of money to pay damages arising from an automobile accident for which the policyholder is legally liable.

Floater Policy

A policy covering the same risk at a number of unspecified locations, and usually includes suggestions of goods being frequently moved from one location to another, e.g. Fur Floater, Jewellery Floater.

Form

Generally the printed part of a policy is referred to as the "form". There are printed parts for most policies and these are frequently identified as the "fire form", "liability form", etc.

Franchise

A provision in an insurance policy whereby the insured pays claims up to a predetermined amount. If, however, any loss exceeds that amount, then the insurance company assumes responsibility for the full amount of the loss including the franchise amount (see deductible).

Green Book

An annual automobile experience exhibit produced for government by the statistical arm of Insurance Bureau of Canada.

Guaranteed Cost

Premium charged on a prospective basis which may be fixed or adjustable on a specified rating basis but never on the basis of loss experience.

Homeowner's Policy

A package policy designed to cover the various risks of a homeowner. Coverages for the building, personal property and legal liability are incorporated into one contract.

Insurable Interest

To make insurance policies legal and valid, the insured must possess such an interest in the subject of insurance as may be sufficient to involve him in a monetary loss, should the subject be damaged or destroyed. In other words, if he has a direct monetary interest in the property to be insured, or the risk to which he is exposed, he has insurable interest. This interest may be of various characters - it may be that of an owner, of a lessee, of a guardian, a bailee, an executor, administrator, bailiff or sheriff, a creditor. As long as there is a real monetary interest, there is an insurable interest.

Insurance

Is the undertaking to indemnify another person against loss or liability for loss in respect of specified perils or upon the happening of a specified event.

Insured

One who transfers a risk to another. The person named in the agreement of indemnity from an insurance company (or person) affording them indemnity from perils as set out therein. Interchangeable with assured.

Insurer

The insurance company who has agreed to accept the risk and to supply the indemnity to an insured in the event of loss.

Insuring Clause

The part of the insurance policy which sets out the specific agreement to protect against the particular peril for which the insurance is purchased. It is an essential part of all insurance contracts.

Legal Liability

The responsibility imposed under law upon one person to another whether by negligence (common law) or by statute or contract.

Liability Insurance

Provides protection for the insured against loss arising out of his legal liability resulting from injuries to other persons or damage to their property.

Lloyd's

A broad term used to designate a group or groups of individuals, known as syndicates, not insurance corporations or companies, assuming liability through an underwriter. Each individual independently assumes a proportionate part of the insurance accepted by the underwriter.

Loss or Damage

Loss is technically distinguished from damage in fire insurance when all or any portion of the property insured is consumed. "Loss" designates that portion which is entirely consumed, while "damage" designates that part of the property which is not consumed, but remains after a fire in a damaged condition.

Loss Ratio

Proportionate relationship of incurred losses to earned premiums expressed as a percentage.

Malpractice Insurance

Coverage afforded to a professional practitioner, such as a doctor or lawyer, against liability claims for damages resulting from alleged negligence in the performance of the insured's services.

Merit Rating

A system of rating whereby the insured with a good experience obtains benefits at a lower rate. Commonly used in automobile insurance where an accident-free driver for a certain period of time is given a discount from a listed rate he would otherwise pay.

Mortgage Clause

A policy provision containing an agreement to notify the mortgage holder of changes in the policy, to have his rights unaffected by acts or omissions of the insured, and to have every loss payable to him as his interest may appear.

No Fault (Automobile)

A common description of insurance which will pay the insured person and others involved in accidents without determining his degree of fault. Examples are collision insurance and the limited accident benefits.

Open Cover

An agreement under which risks of a specified category may be declared and insured. Most frequently used in marine insurance.

Package Policy

A combination of the coverages of two or more separate policies in one contract with one premium.

Peril

This term refers to the causes of possible loss in the property field, for instance, fire, windstorm, collision and hail. In the casualty field, the term "hazard" is more frequently used.

Policy

The actual contract of insurance with all its details.

Pool

An organization of insurers or reinsurers through which particular types of risks are underwritten with premiums, losses and expenses shared in agreed ratios.

Premium

The sum of money paid by an insured in consideration of the acceptance of a risk by an insurer. Earned premium is the proportion of the total premium which would pay for insurance from the inception date of the policy until the particular date at which it is desired to calculate the earned premium. Direct premium is the total premium received from all sources including reinsurance assumed from other companies. Written premium is the total amount of premium collected on that class of business or on all classes of business.

Premium Deposit

When the terms of a policy provide that the final earned premium be determined at some time after the policy itself has been written, companies may require tentative or deposit premiums at the beginning which are re-adjusted when the actual earned charge has been later determined.

Proof of Loss

The written document signed by the insured, formally making a claim against the insurer.

Property Insurance

Provides financial protection against loss or damage to the insured's property caused by such perils as fire, windstorm, hail, explosion, aircraft, motor vehicles, vandalism, malicious mischief, riot and civil commotion, and smoke.

Rating Bureau

A non-profit organization of insurance companies formed to promulgate rates for its members and subscribers.

Recovery

The amount of loss which an insurance company gets back from reinsurance, salvage or by subrogation against the person responsible for the loss.

Reinsurance

The process whereby a company may share its risk with another, paying to such sharing company a portion of the premium it receives. Loss payments are made, by the company accepting the reinsurance, direct to the producing company, not the policyholder.

Renewal Certificate

The form used to change the expiry date of the contract.

Replacement Cost Insurance

Insurance which pays the full value of damaged or destroyed property without taking depreciation into consideration.

Reserve

See "Claim Reserve" and "Unearned Premium Reserve".

Retrospective Rating

A plan or method which permits adjustment of the final premium on the basis of the actual loss experience under the subject policy, subject to minimum and maximum limits.

Self-Insurer

An individual, partnership or corporation who retains all or part of the risk for its own account and purchases an excess of loss cover to protect itself in the event of a catastrophe.

Subrogation

When a company pays a loss for which some person other than the policyholder is responsible, the company's right to recover its loss from the guilty party is the right of subrogation.

Suretyship

(1) The function of being a surety; (2) Stated in its simplest terms, suretyship embraces all forms of obligations to pay the debt or to answer for the default of another.

Syndicate

In insurance, usually a group of companies or other underwriters who join together to insure certain property which may be of such value, or of such high hazard, or so expensive to underwrite that it can be done on a co-operative basis more efficiently. (See Lloyd's)

Term

The period of time from the inception to the termination of an insurance contract.

Third Party

The claimant under a liability policy. So called because he is not one of the two parties - insured and insurer - who enter into the insurance contract which pays his claim.

Tort

An act or omission that may give rise to an action in damages.

Umbrella Policy

A form of excess liability insurance available to corporations and individuals protecting them against claims in excess of the limits of their basic policies, or for claims not covered by their insurance program.

Underwriter

The insurance company or group that underwrites or insures a particular risk. It is also used to identify the individual in the company who accepts or rejects business in the particular line he specializes in, and in this way, chooses risks his principals are prepared to consider.

Unearned Premium Reserve

Insurance premiums are paid in advance. A company, however, "earns" the premium only as fast as time elapses. Yesterday's premium is earned. Tomorrow's premium is unearned. The unearned premium reserve is the sum of all the unearned premiums of all the unexpired policies that a company has on its books.

Void or Voidable

A contract is void when it is destitute of all legal effect. A voidable contract is one which can be made void at the option of one of the parties.

Waiver

An intentional relinquishing of a known right. A waiver under a policy is required to be clearly expressed and in writing. See also "Estoppel".

NOTE: **The Glosary of Insurance Terms** published by the Insurance Institute of Canada has been reprinted with permission.

APPENDIX B

SUMMARY OF STATUTES REVIEWED

The Family Law Act

In 1978, Part V of the Family Law Reform Act gave members of an injured person's family the right to recover their out-of-pocket expenses as well as the right to claim compensation for loss of guidance, care and companionship. The right to claim was restricted to parents, children, siblings, grandparents and grandchildren. Claims that cousins, aunts, nephews etc. have received awards, rose out of claims made with respect to the family protection endorsement for automobile liability insurance policies only. In the past, more distant relatives could file claims for losses in automobile accidents. However, as of February 1, 1985, the coverage under these endorsements was reduced to spouse and dependant relatives.

Until recently, all claims by family members had to be made in one law suit. Rather than risk a charge of malpractice, lawyers for plaintiffs named all eligible family members in the suit. The result was a great number of "nuisance claims" in addition to legitimate claims. It is probably as a result of this practice that insurers have consistently complained about the impact of this Act. However, the new Family Law Act, effective March 1, 1986, removes this single suit requirement in the hope that most individuals would not sue for small amounts and thus the number of small claims would be considerably reduced. The Committee has learned that awards are not given under this Act unless a loss is proven, and that awards usually range in size from $5,000 to $15,000 depending

on the closeness of the relationship. However, many court awards have been in the $30,000 - $40,000 range and have reached the $95,000 level in one known case.

The Limitations Act

The present Limitations Act is a compilation of 13 English statutes enacted between 1588 and 1888. It is obscure, archaic and needs to be brought into conformity with the statutes of the other Provinces according to the Ministry of the Attorney General.

Accordingly, Bill 160 was introduced in December, 1983. This Bill set three general limitations periods: 2, 6 and 10 years, to cover almost all cases. Some existing limitations periods would have been preserved, including one in the Municipal Elections Act and two in the Conflict of Interest Act. The Committee discussed the concerns with Bill 160, as expressed in AMO's resolution, with a representative of the Attorney General's office. These concerns included:

- retention of the three month limitations period for claims based on non-repair of public highways;
- retention of current notice provisions for claims based on non-repair of public highways;
- "capping" of limitations period for claims brought by persons suffering a disability at 10 years;

- exemption from abolition of prescriptive easements for municipalities and public utilities; and
- no adverse possession of lands vested in a municipality.

The Committee has been advised that the Attorney General is willing to consider all of the above concerns with the exception of the capping of the limitations period for disability claims.

The Negligence Act

Section 2 of this Act states that where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence. The intent of this provision is to ensure that those who are being compensated for a loss resulting from the negligence of others recover as much of their damages as possible. As an example, if two people are responsible for a plaintiff's loss, then the court will attempt to collect the award from both defendants according to their individual degrees of liability. If one defendant can't pay his full share of the award, then under this Act, the court will attempt to obtain the outstanding balance from the other defendant.

Although the rationale for this approach appears sound, the practical application of the law can distort the fundamental principles of the tort system (i.e. the degree to which each defendant is responsible for the accident). A plaintiff's

counsel will name all conceivable parties in liability suits rather than risk not collecting the full award. Municipalities claim that they have become the victims in this process because they are routinely added to the list of defendants. Under the best of circumstances, where a municipality is held blameless, it still must bear the cost of its defence.

Municipalities claim that, in an increasing number of cases, the chances of a plaintiff's lawyer's being able to convince the presiding judge that the municipality is, in some small way liable, are sufficient enough to warrant naming it as a defendant. The reasons for naming the municipality, particularly in cases of serious injury, are twofold:

- should the other defendants not be able to meet their full obligations under the law, the municipality has the resources to make full restitution;
- since municipalities do have a large financial base, the judge may be more inclined to award on the high side, particularly in cases where the future cost of care for the injured victim is difficult to predict.

Occupiers' Liability Act (OLA) and Trespass to Property Act (TPA)

The Committee has heard arguments that, since these two Acts were brought into force in September, 1980, liability for the care of municipal property has increased. Municipalities feel that because of the OLA, they must now post signs on their

vacant property, granting either limited permission or limited prohibition, or run the risk of potential law suits for injuries incurred by those entering their property. The posting, maintaining and inspecting of signs, particularly for municipalities with large amounts of vacant land, is both time consuming and very expensive.

The Committee has also heard that neither Act increased municipal "duty of care" for property. There has always been a common law duty of care and sections 2 and 3 of the OLA merely replace the common law responsibilities. In fact, others have argued that Section 4 of the OLA actually reduces the occupier's duty of care for rural and recreational properties. In these cases, the individual entering the property is deemed to have willingly assumed all risks. The occupier, on the other hand, owes only limited duty of care:

a) "to not create a danger with the deliberate attempt of doing harm or damage to the person or his property"; and

b) "to not act with reckless disregard of the presence of the person or his property".

Traditionally, risks willingly assumed by a plaintiff were restricted to factual situations where the risk was fully appreciated and understood by the plaintiff. This section does seem to reduce the traditional duty of care to the benefit of municipalities.

What appears to have happened is that, as society has become more suit conscious, municipalities have faced more and more suits resulting from bodily injuries occurring on their property. The McErlean case illustrated, in a dramatic fashion, the extent to which municipalities could be held liable in a successful suit. Many municipalities are only now becoming aware of the the extent to which they have always been liable for the care of property in their possession.

Fencing or posting signs on municipal land that is considered rural or recreational, is both costly and of little real benefit to users of the property. In fact, the only real benefit derived would be to the municipality, in its defence of liability actions against it.

Environmental Protection Act/Part IX

Part IX of this Act, commonly referred to as the "Spills Bill", prescribes when and how compensation claims can be made in the event of a spill of a contaminant into the environment.

The Committee has heard from a number of representatives from the insurance industry, the municipal sector, and private industry. In addition, the Ministry of the Environment will be commenting on the Regional/District and Metropolitan Solicitors' Group Insurance Recommendation B(ix) on Pollution Liability Association Policy. The Solicitors' Group submitted

a brief to the Provincial Task Force on Insurance and to this Committee. Their concerns were as follows:

"(ix) Pollution Liability Association Policy

The government recruited insurance pool coverage purporting to cover spills claims up to $500,000 [per incident] is totally inadequate for The Metropolitan Corporation's purposes for the following reasons:

(a) restoration and economic losses are not covered,
(b) defence costs reduce the effective limits of the policy,
(c) exclusion numbers 3(b), 3(d), 3(f), 3(g), 3(h), 3(j), 3(m)(l) are so broad, that most operations would be excluded,
(d) The Metropolitan Corporation may or may not be an insured within the meaning of Clause II 1.(c),
(e) the definition of 'pollution incident' is wide enough to exclude waste disposal site operations, notwithstanding the proviso in Clause V 12., and in light of exclusions 3(f) and (g),
(f) the insurer can unilaterally cancel the policy on 30 days' notice,
(g) defence costs will draw down the policies aggregate annual limit of $2,000,000, and
(h) the premium cannot be ascertained as it would be part of a CGL policy premium, which coverage is unavailable."

Courts of Justice Act

1) Prejudgement Interest

This Act replaced the Judicature Act in January, 1985 and contains the provisions that govern the determination of prejudgement interest on awards. Prejudgement interest can only be awarded for past, not future economic losses.

Insurance companies claim that prejudgement interest has greatly added to the cost of claims and that lawyers for both defendants and plaintiffs are guilty of prolonging the suits to increase their fees. The Advocates' Society counters these claims by saying that before the advent of prejudgement interest, it was the insurers who caused most of the settlement delays. In addition, most settlements are made out of court and prejudgement interest is invariably compromised.

Regardless of who causes the delays, prejudgement interest can add substantially to the cost of settlements and, hence, the premiums paid by insureds.

2) Structured Settlements or Periodic Payments

Before Section 129 of the Courts of Justice Act was enacted, the courts did not have authority to permit periodic payments for any part of a plaintiff's award. Now, if all affected parties consent, a judge may order the defendant to make periodic payments for all or any part of the award. In addition, the judge may also require periodic reviews of and subsequent revisions to these payments. Although this was a step in the right direction, it did not go far enough. In many instances the counsel for the plaintiff will opt for a lump sum award. Lump sum awards present a number of problems to insurers, which directly impact on liability insurance premiums. First, it is difficult to accurately estimate the reserves required for bodily injury awards. The judge must

estimate the victim's future income losses and care costs based on actuarial reports presented by the plaintiff and the defendants. Second, the "gross-up" of lump sum awards, in recognition of future personal income taxes on the investment income earned on the award, must be recovered through premiums. In the McErlean case, over $3 million of the award was in respect of future federal and provincial personal income taxes.

The potential for incurring multi-million dollar awards does exist and is of grave concern to the municipal sector, as well as the insurance industry. The rationale for lump sum settlements is to ensure that a victim will not be at the mercy of the Crown for life-long care and comfort. While this is an important principle, the lump sum award does not guarantee that the victim will not eventually end up in the care of the Crown, if the award is not prudently managed.

Health Insurance Act

Section 36 of this Act gives the Ontario Health Insurance Plan (OHIP), the right to bring action to recover both past and future health care costs for any person, insured by OHIP, who is injured as the result of the negligence or other wrongful act or omission of another. These rights are referred to as "subrogation rights".

While past medical costs are readily identifiable, future costs are somewhat less predictable and can add substantially to the size of an award.

In the case of automobile accident claims, OHIP gave up its subrogation rights in exchange for annual payments that are commensurate with its costs with respect to motor vehicle accidents. The Insurance Bureau of Canada administers this agreement for OHIP. In 1984, OHIP received 2.4 per cent of all bodily injury and personal damage premiums written by the auto insurers.

The benefit of such an arrangement from the insurers' perspective is that the victims' medical costs are no longer an issue in claims for damages and medical costs have become a predictable financial obligation to the OHIP plan.

APPENDIX C

PRESENTATIONS MADE TO THE COMMITTEE

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Allan O'Donnell, O'Donnell and Frank, Barristers

Bill Andrus, Actuary, and Raymond Murrill, The Wyatt Company

Michael Cochrane, Counsel, Ministry of the Attorney General

Michael A. Hogan, Vice-President, Osborne and Lange Inc.

Frank Cowan, President, and John Clark, Vice-President,
Frank Cowan Company Ltd.

John St. Pierre, John Gunderman, Joe Rinaldo, Ron Chittick, and
Gil Paterson, Urban Finance Officers' Association

Bert Raphael (Advocate Society), Raphael, Wheatley & MacPherson

George Peterson, Society of Public Administrators of Ontario

H. E. Hartley, President, OME Insurance Brokers Limited

A. Dickson Wood, Counsel, Dupont Canada Inc.

APPENDIX D

BRIEFS SUBMITTED TO THE COMMITTEE

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1. Municipal Insurance in Ontario: Facts and Opinions, O.M.E. Insurance Brokers Limited.

2. Brief to the Ontario Task Force on Insurance, The Advocates' Society, February 28, 1986.

3. Municipal Liability Insurance "Self-Funding" Concept (Alternatives), M.A. Hogan, Vice-President, Osborn & Lange Inc.

4. Risk Management: What is Risk Management? George Peterson, Society of Public Insurance Administrators of Ontario.

5. Risk Management, Frank Cowan Company Limited.

6. Submission to the Ontario Task Force on Insurance of the City of North Bay, dated February 28, 1986, Michael B. Burke, City Solicitor.

7. A Submission to the Provincial Task Force on Insurance, the Regional Municipality of Niagara, February 28, 1986.

8. 1986 Liability Insurance Coverage and Related Matters, Harry Poch, Metropolitan Toronto Legal Department.

9. Regional/District and Metropolitan Solicitors' Group Insurance Recommendations, Harry Poch, Metropolitan Toronto Legal Department.

10. Facts About Municipal Self-Insurance Pooling in Michigan, Eugene F. Berrodin and Robert J. Kish, Michigan Municipal League.

11. Proposal to the Ministry of the Environment regarding Part IX of the Environmental Protection Act, submitted by the Canadian Manufacturers' Association, the Canadian Chemical Producers Association, the Ontario Petroleum Association, the Ontario Truckers' Association, the Canadian National Railway and the Canadian Pacific Railway, November 24, 1983.

12. Exploratory Meeting on the Subject of Municipal Risk Management, Association of Municipalities of Ontario, November 19, 1985.

13. Metro Group Liability Insurance Program, City of Toronto, December 4, 1985.

14. Preliminary Brief on Liability Insurance, Urban Finance Officers Association of Ontario, March 6, 1986.

15. Reciprocal Insurance Exchanges, Financial Institutions Division, Ministry of Consumer and Commercial Relations, March 1986.

16. Tax Gross-Ups and Periodic Damage Payments - Why Not Structured Judgments? Western General Mutual Insurance Company, March 5, 1986.